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In the Supreme Court of the United States

October Term, 1943

SECURITIES AND EXCHANGE COMMISSION,
PETITIONER

v.

C. M. JOINER LEASING CORPORATION AND
C. M. JOINER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered February 1, 1943, which affirmed the judgment entered on May 21, 1942, by the United States District Court for the Northern District of Texas, Dallas Division.

OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 195–202) are not yet reported. The oral opinion of the District Court (R. 116a–118a) is unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 1, 1943 (R. 202). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, which is made applicable by Section 22 (a) of the Securities Act of 1933 (15 U. S. C. § 77v (a)).

QUESTION PRESENTED

The sole question presented is whether, under the undisputed findings of fact, certain sales of oil and gas leases involved sales of a "security" as defined in Section 2 (1) of the Securities Act of 1933.

STATUTE INVOLVED

Section 2 (1) of the Securities Act of 1933, as amended (15 U. S. C. § 77b (1)), provides as follows:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any cer-

tificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

STATEMENT

This action was instituted by the Commission to enjoin C. M. Joiner Leasing Corporation and C. M. Joiner individually from selling securities through the mails or in interstate commerce in violation of the registration and prospectus requirements of Section 5 (a) of the Securities Act of 1933 (15 U. S. C. § 77e)[1] and the anti-fraud provisions of Section 17 (a) (15 U. S. C. § 77q (a))[2] (R. 2a–

[1] "Sec. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

"(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

[2] "Sec. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

9a). The transactions which were alleged to involve the sale of securities occurred in connection with assignments of oil and gas leases. The facts, which are not in dispute, may be summarized as follows:

Respondent, C. M. Joiner Leasing Corporation, acquired by assignment oil and gas leaseholds in a 3,000-acre tract in Texas (R. 75a). This tract was given the name of Joiner Paramount Development. In order to finance the drilling of a well,[1] respondent, C. M. Joiner, embarked upon a sales campaign, offering to sell to the public, in widely scattered areas throughout the country, instruments purporting to be assignments of leaseholds in specific portions of the tract (R. 76a). These portions covered as little as 2½ or 5 acres and never more than 20 acres, and the price varied from $5 to $15 an acre (R. 73a, 96a, 176a–177a). The offering was begun without a disclosure of the location of the Joiner Paramount Development, and the purchasers generally had no choice as to the location of the land covered by their leases. They were invited to purchase leases on undescribed, unlocated acreage which was selected in each case by the promoters. (R. 127a.) The selling literature was clearly aimed at creating the impression that investors would earn a profit through the efforts of Joiner in drilling a well on the tract and bringing in oil (R. 121a–181a).

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[1] The contractor drilled down 1,375 feet without striking oil and then abandoned his efforts (R. 30a).

The District Court, while finding that respondents' literature was fraudulent and misleading (R. 116a), denied the injunction on the ground that the transactions involved did not constitute sales of a security within the meaning of Section 2 (1) of the Securities Act. The court below, Hutcheson, J., dissenting, affirmed.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Atherton* v. *United States*, 128 F. (2d) 463.

In the *Atherton* case, the court held that assignments of oil and gas leases in minimum lots of 2½ acres each to finance the drilling of a well on a 160-acre tract under lease in Oklahoma involved sales of a "security" in the nature of an "investment contract" within the meaning of Section 2 (1) of the Securities Act of 1933. Affirming convictions based on the fraudulent sale of such assignments in violation of Section 17 (a) of the Securities Act, the court stated (at p. 465):

> It is made clear in the indictment and in the proof that the purchasers looked entirely to the efforts of the promoters to make their investment a profitable one. The small leased acreage acquired by the individual purchaser was not itself susceptible of economic development, nor was the purchase made with the idea of independent exploita-

tion. The leases were sold at prices ranging from $50 to $200 per acre upon the promise and representation that the proceeds of the sale would be used for bringing a well into production on the drill site, thus proving the productivity of the whole area under lease. It was proposed that when the well was completed the entire acreage, including the area selected as the drilling site, would be sold as one unit, and that each purchaser of an assignment would receive a proportionate share of the purchase price. Clearly, the investor acquired more than a mere lease.

In the instant case, as in the *Atherton* case, the facts establish that the lots were not assigned for development or use by the purchasers. The size of the acreage and the distance of the purchasers from the land involved wholly negate such a conclusion. Rather, it was clearly contemplated that the purchasers were acquiring an interest the value of which was to be developed by respondents. In these controlling respects, the instant case is identical with the *Atherton* case.[1]

[1] The court quoted the paragraph of the *Atherton* case set out above in the text and italicized the last sentence in support of its statement that its decision was not "out of harmony with" the *Atherton* case. That sentence, however, was the conclusion of law reached by the Ninth Circuit on the basis of the facts which were substantially repeated in the present case. It was not itself a statement of fact which might have distinguished the two cases.

It is true that in the *Atherton* case the understanding as to the reliance of the purchasers on the promoters to earn them a profit by drilling a well and bringing in oil was

It is to be noted that, as a result of the conflict between the instant case and the *Atherton* case, two opposing rules of law obtain in Texas and California, the two largest oil-producing states, which account for the greatest number of oil and gas promotions.

2. The question presented is one of importance in the administration of the Securities Act of 1933, particularly since it involves oil promotion, a field notoriously fertile in schemes by which the unscrupulous have dealt with other people's money.

It has been the Commission's experience that the field of promotion is marked by an indefinite variety of devices invented in an attempt to make the sale of securities appear to be the sale of property. The regulation of the bond and share field has led purveyors of fraudulent financial promotions to transfer their activities to other schemes believed more likely to be immune from effective enforcement of the Act. The decision below would afford a ready method of evading the Act by permitting oil and gas promoters to cut their schemes to fit the purely formal requirements which the court below held sufficient to avoid the Act.

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somewhat more express. The court below, however, did not attempt to base a distinction on this point, and, indeed, the difference is insubstantial.

United States ex rel. Securities and Exchange Commission v. *Shoemaker* (Cr. No. 2343, E. D. Okla., Nov. 9, 1942) is in accord with the *Atherton* decision. See particularly the third conclusion of law. This is an unreported criminal contempt case. Copies of the court's findings and conclusions are being filed with the Clerk.

In Section 2 (1) of the Securities Act, Congress has provided a broad and flexible definition designed to extend the registration and anti-fraud provisions of the Act to the variegated schemes conceived by those who would circumvent the law. The courts have accordingly looked through technicalities and have defined the phrase "investment contract" in Section 2 (1) to include any transaction where the investor looks solely to the efforts of the promoter for the success of his investment. By emphasizing substance rather than form, the courts have effectuated the congressional intention in defining this type of security. Thus, there is a substantial body of cases, both federal and state, in which the purported "sale" or "lease" of some species of real or personal property has been held to involve a sale of a security in the nature of an investment contract. These cases have covered securities disguised as sales of muskrats, rabbits, silver foxes, oyster-bottom acreage, interests in tracts for the development of tung trees, shares in fishing boats, whiskey-bottling contracts, and bills of sale and delivery contracts for crude oil, in addition to the assignments of oil and gas

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Securities and Exchange Commission v. *Crude Oil Corporation of America*, 93 F. (2d) 844 (C. C. A. 7); *Securities and Exchange Commission* v. *Universal Service Association*, 106 F. (2d) 232 (C. C. A. 7), certiorari denied, 308 U. S. 622; *Securities and Exchange Commission* v. *Cultivated Oyster Farms Corp.*, CCH Fed. Securities Law Service, New Matters Vol., par. 90,121 (S. D. Fla.; No. 350, March 22,

leases." And, similarly, in the cases coming before it for administrative adjudication, the Commission has taken the same view. See *Natural Resources Corporation*, 8 S. E. C. 635, which involved facts identical with those here presented.

The court below, however, has emphasized the form of these transactions at the expense of their substance. As Judge Hutcheson's dissenting opinion recognizes (R. 201–202), whatever the appearance of these transactions as a simple assignment of an oil lease, in fact the purchasers (scattered as they are throughout the country and having neither the intention nor the ability to develop their leasehold rights) did not buy leasehold interests in specific pieces of real property, but made a speculative investment in oil leases from which they expected to secure a profit entirely through the activities of the promoters in bringing in a successful well and thus increasing the value of all of the surrounding acreage. These circumstances

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1939, unreported); *Securities and Exchange Commission* v. *Tung Corporation of America*, 32 F. Supp. 371 (N. D. Ill.); *Securities and Exchange Commission* v. *Pyne*, 33 F. Supp. 988 (D. Mass.); *Securities and Exchange Commission* v. *Pyne*, 35 F. Supp. 873 (S. D. N. Y.); *Securities and Exchange Commission* v. *Bailey*, 41 F. Supp. 647 (S. D. Fla.); *Securities and Exchange Commission* v. *Bourbon Sales Corp.*, 47 F. Supp. 70 (W. D. Ky.); *Kerst* v. *Nelson*, 171 Minn. 191, 213 N. W. 904; *State* v. *Robbins*, 185 Minn. 202, 240 N. W. 436; *Stevens* v. *Liberty Packing Corp.*, 111 N. J. Eq. 61, 161 Atl. 193; *Commonwealth* v. *Satold*, 38 Dauphin County Rep. (Pa.) 233.

See *supra*, pp. 6–7n.

would lead to the conclusion that an "investment contract" was here involved.[1]

CONCLUSION

Because of the conflict ~~between~~ with the Circuit Court of Appeals for the Ninth Circuit and the importance of the question presented, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JOHN F. DAVIS,
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Securities and Exchange Commission.

MARCH, 1943.

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[1] *Securities and Exchange Commission* v. *Universal Service Association*, 106 F. (2d) 232, 237 (C. C. A. 7), certiorari denied, 308 U. S. 622; *State* v. *Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N. W. 937, 938; *Lewis* v. *Creasey Corp.*, 198 Ky. 409, 248 S. W. 1046, 1048.